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INSTAGRAM, LLC

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

PIXELS.COM, LLC, AN ILLINOIS
LIMITED LIABILITY COMPANY,

Plaintiff,

v.

INSTAGRAM, LLC, A DELAWARE
LIMITED LIABILITY COMPANY,

Defendant.

Civil Action No. 3:15-cv-03610-VC

**NOTICE OF MOTION AND MOTION
TO DISMISS FOR FAILURE TO STATE
A CLAIM ON WHICH RELIEF MAY BE
GRANTED; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF MOTION TO DISMISS
FOR FAILURE TO STATE A CLAIM ON
WHICH RELIEF MAY BE GRANTED**

DATE: December 17, 2015

TIME: 10:00 a.m.

PLACE: Courtroom 4, Courtroom of the
Honorable Vince Chhabria, District Judge

Complaint Filed: August 6, 2015

Trial Date: [Not Set]

TO PLAINTIFF AND ITS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on December 17, 2015 at 10:00 a.m., or as soon
thereafter as counsel may be heard in Courtroom No. 4, the Courtroom of the Honorable Vince
Chhabria located at the Phillip Burton Federal Building and United States Courthouse, 450 Golden

1 Gate Avenue, 17th Floor, San Francisco, California 94102, Defendant Instagram, LLC
2 (“Defendant”) will and hereby does move the Court to dismiss the sixth, seventh, eighth and ninth
3 claims for relief averred in Plaintiff Pixels.com, LLC’s (“Plaintiff”) First Amended Complaint for
4 Declaration of Non-Infringement and Non-Dilution of Trademark Rights and for Antitrust
5 Violations (“FAC”) on the grounds that those counts fail to state a claim on which relief can be
6 granted.

7 Specifically, the relief sought by movant is that Plaintiff’s Count VIII (for violation of
8 antitrust laws) be dismissed because: 1) the FAC identifies an implausibly overbroad relevant
9 market where the products that supposedly compete in such market are not interchangeable with or
10 substitutes for one another; 2) the alleged relevant market is so broad that Plaintiff cannot allege any
11 plausible basis for inferring that Defendant possesses the requisite market share necessary to state a
12 viable antitrust claim under Section 2 of the Sherman Act; 3) the FAC impermissibly contradicts
13 allegations made in the original complaint that Plaintiff “fall[s] outside Defendant’s relevant
14 market” which demonstrated that Plaintiff lacked the requisite standing and/or antitrust injury
15 necessary to state an antitrust claim; 4) the antitrust claim is precluded by the *Noerr-Pennington*
16 doctrine and the “sham” exception thereto does not apply; and 5) the “trademark misuse” alleged by
17 Defendant does not support an antitrust claim. Movant seeks dismissal of Plaintiff’s Count IX for
18 violation of California Business & Professions Code section 17200 because it is wholly derivative
19 of its antitrust claim and must be dismissed along with that claim. Movant seeks dismissal of
20 Plaintiff’s Counts VI for declaratory judgment on equitable grounds based on trademark misuse and
21 Count VII for declaratory relief based on the equitable grounds of acquiescence, laches and estoppel
22 because they are based on theories and affirmative defenses that do not constitute a viable cause of
23 action, they are redundant of Plaintiff’s other claims, they improperly seek to deprive Defendant of
24 the right to petition for redress of grievances and they are an improper basis to oppose Defendant’s
25 objections to the registration of Plaintiff’s “INSTAPRINTS” mark.

1 The motion will be based on this Notice of Motion and Motion, the Memorandum of Points
2 and Authorities filed herewith, Defendant's Request for Judicial Notice and the pleadings and
3 papers filed herein.

4
5 DATED: November 9, 2015

Respectfully submitted,

6 KILPATRICK TOWNSEND & STOCKTON LLP

7
8 By: /s/ Dennis L. Wilson
DENNIS L. WILSON

9
10 Attorneys for Defendant
INSTAGRAM, LLC

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MEMORANDUM OF POINTS AND AUTHORITIES**I. INTRODUCTION**

This is a trademark dispute involving Defendant's senior, registered rights in the trademarks "INSTAGRAM" and "INSTA + design" for a social networking and photo sharing service and platform, and Plaintiff's use of the mark INSTAPRINTS for a service that uses the Instagram Application Programming Interface ("API") to take materials directly from the Instagram service, and then fulfills orders to print those materials. Plaintiff's use of the INSTAPRINTS mark willfully infringes and dilutes the famous INSTAGRAM trademark in violation of the Lanham Act, and also violates the terms of service for the Instagram platform.

As the owner of one of the most famous brands on the internet, Defendant has a responsibility to prevent abuse of its trademarks. It takes this responsibility seriously, carefully evaluating each potential dispute before taking action. While Defendant resolves many enforcement matters amicably, common ground is not always easy to find. Where necessary, Defendant takes extensions of time or files oppositions to prevent the registration of trademarks that are similar to the INSTAGRAM mark and cover related goods or services, or where use of the mark is likely to create an association with Defendant and thus dilute the INSTAGRAM mark.

In this case, Defendant will introduce evidence that Plaintiff selected the INSTAPRINTS name with the intent to create an association with Defendant. Plaintiff's service is literally a service for printing photographs uploaded from Instagram (commonly nicknamed "Insta"), hence the name "Instaprints." Defendant will also introduce evidence that it notified Plaintiff of its concerns, and offered to work with it on a reasonable resolution and to answer any questions it may have about Instagram's policies. Plaintiff has rejected Defendant's overtures, and continued in willful violation of Instagram's trademarks and the terms of use for the Instagram platform and has now commenced a legal action in an attempt to thwart Defendant's exercise of its rights to seek redress for Plaintiff's acts.

In its First Amended Complaint ("FAC"), Plaintiff seeks declaratory judgment of non-infringement, non-dilution, and no false designation of origin; it alleges two claims for a declaratory judgment based on equitable grounds (one for alleged trademark misuse and the other

1 premised on acquiescence, laches and estoppel); and it also raises two affirmative claims, a
2 patently defective claim for violation of the antitrust laws and a related derivative claim under
3 California Business and Professions Code § 17200 (“UCL”). Defendant hereby moves to dismiss
4 Plaintiff’s antitrust claim and the UCL claim, which is predicated on the antitrust claim.
5 Defendant also moves to dismiss the sixth and seventh claims for relief for declaratory judgment
6 based on equitable grounds because those claims are defective as a matter of law.

7 The antitrust claim and all claims predicated on the antitrust claim included in the FAC
8 should be dismissed for the following reasons:

9 (1) The FAC identifies an implausibly overbroad relevant market -- i.e., one for
10 “providing an interactive website or mobile application that allows users to receive goods or
11 services quickly or instantaneously,” even though the products that supposedly compete in this
12 market are not interchangeable with or substitutes for one another;

13 (2) The alleged relevant market is so broad that Plaintiff cannot allege any plausible basis
14 for inferring that Defendant possesses the requisite degree of market power necessary to state an
15 antitrust claim under Section 2 of the Sherman Act;

16 (3) The FAC contradicts allegations made in the original Complaint that Plaintiff “fall[s]
17 outside Defendant’s relevant market”;

18 (4) Plaintiff cannot circumvent Defendant’s immunity available under the Noerr-
19 Pennington doctrine for petitioning activities before government agencies by claiming that
20 Defendant allegedly engaged in “sham” petitioning because the allegedly improper petitioning
21 was not objectively baseless nor was it directed at a competitor; and

22 (5) The trademark misuse allegations fail to state an antitrust claim as a matter of law.

23 Plaintiff’s state-law UCL claim, necessarily falls along with the antitrust claim, upon
24 which the UCL claim is predicated.

25 Finally, Plaintiff’s claims for declaratory relief on equitable grounds fail for multiple
26 reasons including that declaratory relief requires an underlying viable claim and there is no legally
27 cognizable affirmative claim for trademark misuse nor one based on the equitable defenses of
28 acquiesce, laches or estoppel; Plaintiff is not entitled to a declaratory judgment that deprives

Defendant of a right to petition for grievances; and the defenses raised by Plaintiff are an invalid basis to oppose Defendant's objections to the registration of Plaintiff's "INSTAPRINTS" mark.

II. LEGAL STANDARD

A court may properly dismiss a claim under Rule 12(b)(6) due to the lack of a cognizable legal theory or the absence of sufficient facts to support a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988). "Threadbare recitals of the elements of a cause of action, supported by mere conclusionary statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Instead, "[f]actual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the allegations in the complaint are true." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In this regard, a complaint must contain enough factual evidence to make a claim plausible before a court will allow the case to proceed to discovery. *Twombly*, 550 U.S. at 559. As the Supreme Court has cautioned, "it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery...but quite another to forget that proceeding to antitrust discovery can be expensive." *Id.* at 558.

III. ARGUMENT

A. Plaintiff's Antitrust Claim Fails to State a Claim for which Relief May Be Granted.

Plaintiff's amendments to its Complaint, made in response to Defendant's earlier motion to dismiss, have made it even more obvious that Plaintiff cannot state a valid antitrust claim and that the antitrust claims and all ancillary claims premised on that claim should be dismissed.

1. Because the FAC Alleges a Legally Deficient and Facially Implausible Relevant Market, the Antitrust Claim Fails as a Matter of Law.

Under Ninth Circuit law and generally, to state a valid claim for monopolization or attempted monopolization under Section 2 of the Sherman Act, an antitrust plaintiff must allege a plausible relevant market. *See Tanaka v. University of So. Cal.* 252 F.3d 1059, 1063 (9th Cir. 2001) (citing cases); *Killian Pest Control v. HomeTeam Pest Defense, Inc.*, 2015 WL 3766754 at *2 (N.D. Cal. June 16, 2015) (Chhabria, J.). A relevant market for antitrust purposes has two components – a product market and a geographic market. *See Sidibe v. Sutter Health*, 4 F. Supp.3d 1160, 1174 (N.D. Cal. 2013); *Newcal Indus., Inc. v. IKON Office Solution, Inc.*, 513 F.3d

1038, 1045 (9th Cir. 2008). An antitrust complaint must contain plausible allegations concerning both the product market and geographic market to survive a motion to dismiss. *Killian Pest Control, Inc.*, Case No. 14-cv-05239-VC, 2015 WL 3766754 at *2; *Sidibe v. Sutter Health*, 51 F. Supp.3d 870, 882-83 (N.D. Cal. 2014). A relevant product market must encompass all products that customers consider to be reasonable economic substitutes, *i.e.*, reasonably interchangeable with one another, and cannot encompass disparate products that customers cannot or will not substitute for one another. *See, e.g., Big Bear Lodging Ass'n v. Snow Summit, Inc.*, 182 F.3d 1096, 1105; *Sidibe*, 51 F. Supp.3d at 884. Accordingly, at the pleading stage, if an antitrust plaintiff fails to define its proposed product market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, the alleged relevant market is legally insufficient and subject to dismissal. *Colonial Medical Group, Inc. v. Catholic Healthcare West*, 2010 WL 2108123 at *3 (N.D. Cal. May 25, 2010) (quoting *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 436 (3d Cir. 1997)). Indeed, an antitrust claim should be dismissed under Rule 12(b)(6) if the “relevant market definition is facially unsustainable.” *Sidibe*, 51 F. Supp. 3d at 883 (N.D. Cal. 2014)(quoting *Newcal, Indus., Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1044-45 n.3 (9th Cir. 2008)); *see also Big Bear Lodging*, 182 F.3d at 1105 (affirming dismissal for failure to plead adequate geographic market).

Here, Plaintiff has yet again failed to allege a legally cognizable relevant market. As to product market allegations,¹ the FAC defines a facially unsustainable relevant market which could never support a valid antitrust claim. The FAC recites an alleged relevant product market “of providing an interactive website or mobile application that allows users to receive a good or service quickly or instantaneously.” FAC ¶ 14. First, the market is alleged only in vague and conclusory terms, which alone warrants dismissal. *Killian Pest Control*, 2015 WL 3766754 at *2 (Chhabria, J.). Moreover, the above referenced proposed market is so broad that it would necessarily include disparate products that are not reasonably interchangeable.

¹ The FAC also contains no allegations and makes no attempt whatsoever to identify the relevant geographic market. As a threshold matter, this failure provides a sufficient basis, without more, to dismiss Plaintiff’s antitrust claim. *Big Bear Lodging*, 182 F.3d at 1105; *see also Tanaka*, 252 F.3d at 1063.

1 This market literally contains hundreds of thousands, if not millions, of products and
 2 services offered over the internet, the vast majority of which have no relation or connection with
 3 each other and certainly are not reasonably interchangeable for each other. This proposed market
 4 definition purports to cover not only Plaintiff's website and apparently the websites and software
 5 applications offered by the third-party trademark applicants against whom Defendant asserted
 6 trademark opposition proceedings, *see* FAC ¶ 108 (the "Third-Party Trademark Applicants"), but
 7 also the websites and mobile applications for countless other companies that sell goods and
 8 services over the internet. Indeed, the FAC's proposed market definition would have such a
 9 massive scope that it would sweep within its boundaries virtually all internet retailers and service
 10 providers – essentially every commercial transaction executed on the internet and via mobile
 11 devices. This unfathomable market breadth would cover businesses such as Amazon.com,
 12 Domino's Pizza, Apple, Netflix, 1-800-Contacts, Verizon, Match.com, eBay, Expedia.com, and
 13 many others. These companies largely sell disparate products or services which do not compete.

14 Looking at the specific companies identified in the FAC, which after Plaintiff amended its
 15 complaint now supposedly all fall within this expansive relevant product market, it is clear that
 16 these companies do not offer goods or services that any customer would consider to be reasonably
 17 interchangeable. For example, Plaintiff and Defendant both supposedly offer goods or services
 18 that would purportedly fall within the scope of the proposed relevant market, but Plaintiff does not
 19 and cannot allege that it competes against Defendant. Rather, Plaintiff carefully avoids claiming a
 20 competitive relationship with Defendant, merely alleging that the parties "operate" in the same
 21 market. FAC ¶ 14. Plaintiff operates an interactive website through which Plaintiff sells artwork
 22 for the account of others. FAC ¶ 12. But the FAC concedes that Defendant "does not currently
 23 sell, nor has it ever sold, artwork or prints from photographs uploaded to Instagram.com". *Id.* ¶
 24 28.

25 And according to Plaintiff, the Third-Party Trademark Applicants offer such non-
 26 interchangeable products as:

- 27 • "computer medical software and photo software for modifying photos of your
 abdominal muscles;"
- 28 • "online non-downloadable software to facilitate the creation of greeting cards,
 announcements, slideshows, and invitations;"

- “personalized decorative household magnets;”
- “social online services related to tattoo art;”
- “advertisement services featuring sponsored tags and images;”
- “services to transmit electronic pet photos;”
- “on-line software to facilitate online forums for meetings, classes, etc.,”
- “software that allows sellers to promote goods by publishing user content;”
- “online social networking services;” and
- “online video conferencing software.”

Id., ¶ 108.

That consumers could not possibly substitute custom magnets for video conferencing software, video conferencing software for greeting cards, or photo printing services for social networking services is obvious and demonstrates why Plaintiff’s proposed market is unsustainably broad. The FAC fails to make any attempt to explain how these different products and services could serve as reasonable economic substitutes for one another or be viewed by consumers as reasonably interchangeable. Similarly, the FAC does not address whether any degree of cross-elasticity of demand may exist between and among the products in the alleged relevant market.

A court may consider at the pleading stage whether an antitrust claim, including the proposed relevant market, is plausible and consistent with economic realities. *See Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1110 (7th Cir. 1984); *Rock v. NCAA*, 928 F. Supp. 2d 1010, 1021-22 (S.D. Ind. 2013); *County of Stanislaus v Pac. G. & E. Co.*, 1994 WL 16798446 (E.D. Cal. Aug. 25, 1994)(quoting and discussing *Carr Carriers*, 745 F.2d at 1110). Indeed, a court is not required to don blinders and ignore commercial reality in deciding whether a plaintiff has adequately alleged a plausible antitrust claim. *See County of Stanislaus*, 1994 WL 16798446 .

Here, common sense and economic reality dictates that many disparate products and services within the alleged relevant market are not reasonably interchangeable and, therefore, the proposed relevant market is unsustainable and thus legally deficient. *See Sidibe*, 2013 WL 2422752 at *15-*16; *Golden Gate Pharmacy Serv. Inc. v. Pfizer, Inc.*, 2010 WL 1541257 at *2-*3 (N.D. Cal. Apr. 16, 2010). Accordingly, the Court should dismiss Plaintiff’s antitrust claim for failing to allege a legally cognizable relevant market.

2. Plaintiff Cannot Maintain Its Antitrust Claim Because It Failed to Satisfy the Market Power Pleading Requirements.

Plaintiff fails to state a viable antitrust claim for the related reason that, given the alleged relevant market, Defendant cannot possibly have – and Plaintiff has not alleged that Defendant possesses – the requisite market power necessary to state a claim under Section 2 of the Sherman Act. To state a claim under Section 2, an antitrust plaintiff must allege facts sufficient to demonstrate that the Defendant has monopoly power (for a monopolization claim) or something dangerously close to monopoly power (for an attempted monopolization claim). *See Synopsys, Inc. v. ATopTech, Inc.*, 2015 WL 4719048 at *8 (N.D. Cal. 2015). Under circumstances in which an antitrust plaintiff alleges a very broad market in which it would be implausible to infer such market power, a court should dismiss a section 2 claim as legally deficient. *See Falstaff Brewing Co. v. Stroh Brewery Co.*, 628 F. Supp. 822, 830 (N.D. Cal. 1986); *Futurevision Cable Systems of Wiggins, Inc. v. Multivision Cable TV Corp.*, 789 F. Supp. 760, 776 (S.D. Miss. 1992).

Here, the excessive market breadth alleged by Plaintiff makes it unreasonable to infer that Defendant could have, or ever obtain, any appreciable share in the alleged relevant market. Virtually any company that sells or provides any goods or services over the internet or through a mobile app would “compete” in this broad market. The FAC does not attempt to explain how, under such circumstances, Defendant could possibly possess either monopoly power or anything dangerously close to monopoly power. It would be futile to even try. The failure to allege market power at all would be enough, without more, to dismiss Plaintiff’s antitrust claim. *Sidibe*, 51 F. Supp.3d at 883. This failure, combined with the economic reality that Defendant simply has no chance to obtain market power over such a broadly defined market, dooms Plaintiff’s antitrust claim beyond repair. *See, e.g., Futurevision Cable Sys.*, 789 F. Supp. at 780; *Fallstaff Brewing*, 628 F. Supp. at 830-31. The Court therefore should dismiss the antitrust claim for failure to plead market power.

3. Plaintiff Cannot Cure Its Prior Legally Deficient Allegations by Amending to Incorporate Contradictory Allegations.

Plaintiff’s antitrust claim fails for yet another reason – the FAC has and must contradict the

allegations in its original Complaint to cure the pleading deficiencies regarding antitrust injury and antitrust standing. The Ninth Circuit has long held “that a plaintiff can . . . plead himself out of a claim” by incorporating contradictory allegations in successive versions of the complaint. *Sprewell v. Golden State Warriors*, 266 F. 3d 979, 988 (9th Cir. 2001); *see also Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 296 (9th Cir. 1990) (amending complaint futile if plaintiff must contradict allegations in original complaint to state a claim). Moreover, courts often dismiss or strike claims from amended complaints as being “false” or “sham” if they contradict earlier allegations. *Bradley v. Chiron Corp.*, 136 F. 3d 1317, 1324 (Fed. Cir. 1998) (applying 9th Cir. law); *Fevinger v. Bank of America*, Case No. 5:13-cv-04839-PSG (N.D. Cal., Aug. 4, 2014).

In its original Complaint, Plaintiff alleged that Plaintiff and the Third-Party Trademark Applicants, against whom Defendant had brought the purportedly improper trademark opposition proceedings, “fall outside [Defendant’s] relevant market.” Dk#1 ¶ 91. Indeed, throughout the original Complaint, Plaintiff had taken the position that Defendant’s trademark claims lack objective merit, in part, because Plaintiff and the other Third-Party Trademark Applicants offer goods and services wholly distinct from those offered by Defendant, do not compete against Defendant, and have nothing to do with Defendant’s business. *Id.* ¶¶ 3, 26, 91-93. Given these prior allegations, Defendant moved to dismiss the antitrust claim alleged in the initial complaint because Plaintiff did not participate in the same relevant market in which the antitrust violation purportedly occurred, and, thus lacked antitrust injury and antitrust standing. Dk# 23 at pp. 5-6.

To cure this obvious deficiency, Plaintiff amended its complaint to: (1) add allegations that Plaintiff and apparently the Third-Party Trademark Applicants supposedly do now “operate” in the same relevant market as Defendant; and (2) delete allegations that most adversaries in the trademark opposition proceedings initiated by Defendant fall outside Defendant’s relevant market. FAC ¶¶ 14; *compare* Dk#1 ¶ 91 (alleging most parties against which Defendant filed opposition proceedings “fall outside Defendant’s relevant market”) *with* FAC ¶ 100 (omitting the allegations about Defendant’s adversaries “fall[ing] outside Defendant’s relevant market”). Plaintiff cannot contradict the allegations in its original Complaint to cure the deficiencies cited in Defendant’s earlier motion to dismiss. *See Reddy v. Litton Indus., Inc.*, 912 F.2d at 296; *see also Sprewell v.*

1 *Golden State Warriors*, 266 F.3d at 988. Plaintiff's antitrust claims should be dismissed on the
 2 additional ground that Plaintiff has improperly amended its claim to contradict the allegations in
 3 the Original Complaint, which showed as a matter of law that Plaintiff could not maintain its
 4 antitrust claim because it lacks antitrust injury and antitrust standing.

5 **4. Plaintiff's Antitrust Claim Seeks to Challenge Conduct Immunized under the**
 6 ***Noerr-Pennington* Doctrine and, thus, Fails to State a Claim.**

7 In addition, Plaintiff's antitrust claim suffers from another independent and fatal flaw – it
 8 is barred by the *Noerr-Pennington* doctrine. The *Noerr-Pennington* doctrine broadly immunizes
 9 from antitrust scrutiny any efforts to petition a government body for redress. See *USS-POSCO*
 10 *Indus. v. BE&K Construction, Co.*, 31 F.3d 800, 810 (9th Cir. 1994). Efforts to protect and
 11 enforce valid trademark rights, even aggressive enforcement efforts, enjoy complete immunity
 12 under *Noerr-Pennington*. See *Adidas-America Inc. v. Payless Shoesource, Inc.*, 546 F. Supp.2d
 13 1029, 1078 n.18 (D. Oreg. 2008). Similarly, *Noerr-Pennington* immunity extends to petitioning
 14 activities before administrative agencies, such as the United States Patent and Trademark Office's
 15 Trademark Trial and Appeal Board ("TTAB"). See *Prakash v. Altadis U.S.A., Inc.*, 2012 WL
 16 1109918 at *10 (N.D. Ohio Mar. 30, 2012).

17 Here, Plaintiff challenges as an alleged antitrust violation a purported pattern of petitioning
 18 activities, specifically oppositions to trademark applications before the TTAB filed by Defendant
 19 against Plaintiff and over sixty third parties. FAC ¶ 100. The FAC concedes that *Noerr-*
 20 *Pennington* extends to Defendant's petitioning activities. See FAC ¶ 105. But, the Plaintiff
 21 claims to have articulated an antitrust claim based on the "sham" exception to *Noerr-Pennington*.
 22 *Id.* Plaintiff, however, has failed to articulate a valid "sham" claim.

23 While the Supreme Court has recognized a sham exception to *Noerr-Pennington*, this
 24 exception cannot and does not apply unless the defendant uses the improper petitioning to disrupt
 25 a competitor's business. Indeed, for the sham exception to apply generally, the alleged sham
 26 petitioning activity must, among other things seek to "'interfere directly with the business
 27 relationships *of a competitor . . .*.'" *Professional Real Estate Investors, Inc. v. Columbia Pictures*
 28 *Indus., Inc.*, 508 U.S. 49, 60-61 (1993) ("*PRE*") (emphasis added) (quoting *Noerr*, 365 U.S. at

144). Similarly, the legal standard applicable to the multi-suit sham (or pattern of sham) claims considers “whether [the multiple petitions] are brought pursuant to a policy of starting legal proceedings without regard to the merits *and for the purpose of injuring a market rival.*” *USS-POSCO*, 31 F.3d at 811 (emphasis added). Thus, to fall within the exception, the alleged sham petitioning conduct must be without merits and undertaken to interfere with a competitor’s business.

Here neither prong exists. In the TTAB proceeding referenced in the FAC, the TTAB expressly found that Defendant had alleged a valid ground for opposing Plaintiff’s registration application by pleading its prior use and registration as well as a plausible claim for likelihood of confusion. See Defendant’s Request for Judicial Notice; Exhibit “B” at p. 5. Next, as discussed above, the FAC claims that Plaintiff “operates” in the same relevant market as Defendant but does not allege that Plaintiff competes with Defendant. FAC ¶ 14. The alleged relevant market also improperly combines a vast number of goods and services that do not compete against, *i.e.*, are not reasonably interchangeable with, each other. The administrative proceedings initiated against Plaintiff cannot possibly qualify as a sham because the FAC fails to allege that the petitioning was directed at a competitor. *PRE*, 508 U.S. at 60-61; *USS-POSCO*, 31 F.3d at 811. The Court should therefore dismiss the antitrust claim as barred by the *Noerr-Pennington* doctrine.

5. Plaintiff’s Trademark Misuse Allegations Fail to State a Valid Antitrust Claim.

Finally, Plaintiff’s allegations that Defendant purportedly engaged in trademark misuse to extend its “trademark monopoly,” FAC ¶ 103, also fail to state a valid antitrust claim. “Since all that is required of a defendant in order to escape the clutches of an alleged trademark monopoly is to market his product under a different name, the damages which may flow from a trademark infringement action cannot support an antitrust counterclaim.” *The Seven-Up Co.*, 183 U.S.P.Q. at 166, 1974 WL 886 at *1. Accordingly, efforts to enforce trademark rights, even against a direct competitor, generally cannot inflict serious enough harm on competition or the competitor to support an antitrust claim. *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 56 (2d Cir. 1997) (quoting *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 298 F. Supp. 1309, 1314 (S.D.N.Y. 1969),

1 *aff'd* in relevant part, 433 F.2d 686 (2d Cir. 1970)); *RJ Machine Co. Inc. v. Canada Pipeline*
 2 *Accessories Co. Ltd.*, 2013 WL 8115445 at *3-*4 (W.D. Tex. Nov. 22, 2013). Trademarks rights
 3 confer upon rights-holders virtually no exclusionary powers, especially not any exclusionary
 4 powers about which the antitrust laws have concerns. *See The Seven-Up Co. v. No Cal Corp.*, 183
 5 U.S.P.Q. 165, 166, 1974 WL 886 at *1 (E.D.N.Y May 17, 1974); *California Packing Corp. v. Sun*
 6 *Maid Raisin Growers*, 165 F. Supp. 245, 251 (S.D. Cal. 1958), *aff'd* 273 F.3d 282 (9th Cir. 1959).
 7 The antitrust laws were simply not intended to prevent any harm that might arise from a trademark
 8 owner's efforts to enforce its trademark rights. *RJ Machine Co. Inc.*, 2013 WL 8115445 at *3;
 9 *The Seven-Up Co.*, 183 U.S.P.Q. at 166, 1974 WL 886 at *1; *California Packing Corp.*, 165 F.
 10 Supp. at 251. Moreover, vigorous efforts to exercise and enforce trademarks rights do not violate
 11 the antitrust laws and are exactly the "sort of aggressive competition and promotion that antitrust
 12 law seeks to protect.'" *Blue Cross and Blue Shield Ass'n v. Group Hospitalization and Medical*
 13 *Services, Inc.*, 744 F. Supp. 700, 719 (E.D. Va. 1990) (citing *Drop Dead Co. v. S.C. Johnson &*
 14 *Son, Inc.*, 326 F.2d 87, 96 (9th Cir. 1963), *cert. denied*, 377 U.S. 907, 84 S. Ct. 1167, 12 L.Ed.2d

15 177 (1964)). Because, as the cases cited above demonstrate, courts have consistently rejected the
 16 type of antitrust claims at issue in this action, this Court should dismiss the antitrust claim and the
 17 ancillary trademark misuse claims because trademark misuse cannot support an antitrust claim
 18 generally and certainly not as alleged here.

19 **6. The Court Should Dismiss the Antitrust and Related Claims With Prejudice.**

20 A court may properly dismiss claims with prejudice under circumstances such as these in
 21 which the plaintiff has had prior opportunity to amend to cure the deficiencies in the complaint or
 22 the plaintiff could not cure the deficiencies without contradicting the allegations in the original
 23 complaint. *See, e.g., Mir v. Frosburg*, 646 F.2d 342, 347 (9th Cir. 1980)(court has broad discretion
 24 to dismiss with prejudice if plaintiff has had an opportunity to amend previously); *Johnson v.*
 25 *Lucent Technologies Inc.*, 653 F.3d 1000, 1012 (9th Cir. 2011) (affirming district court dismissal
 26 with prejudice because plaintiff could not amend complaint without contradicting allegations in
 27 the current complaint). Because both are true regarding Plaintiff's antitrust claim, the Court
 28 should dismiss with prejudice the antitrust claim and all claims predicated on the antitrust claim.

B. Plaintiff's UCL Claims Must Fall along with Its Antitrust Claim.

Plaintiff's UCL claim is expressly predicated on Defendant's alleged use of its "INSTAGRAM" marks to violate the antitrust laws of the United States. FAC ¶¶ 113-25. The applicable authorities have consistently held that extinguishment of the "borrowed" violation extinguishes a plaintiff's UCL claim as a matter of law. Cases have expressly applied this principle in the antitrust area. For example, in *Aguilar v. Atlantic Richfield Co.*, 25 Cal.4th 826, 875, 107 Cal.Rptr.2d 481 (2001), it was held that a claim alleging conspiracy to violate the antitrust laws in which summary judgment has been properly entered cannot be re-pled under the UCL. Similarly, in *Chavez v. Whirlpool Corp.*, 97 Cal.App.4th 363, 375, 113 Cal.Rptr.2d 175, 184 (2001), the court held that where an antitrust action by Whirlpool retailers would be barred by a "Colgate" defense, it also bars the UCL claim based on the same alleged antitrust violation. Because, as demonstrated above, Plaintiff's antitrust claim is fatally defective and must be dismissed, the Court should order the UCL claim dismissed as well.

C. Plaintiff's Sixth Count for Declaratory Judgment Relief on Equitable Grounds- Trademark Misuse Fails to State a Claim.

Plaintiff's sixth claim for relief is for declaratory judgment on equitable grounds – trademark misuse. Therein, Plaintiff alleges that: "Defendant is prevented from objecting to or instituting any action or proceeding with respect to Plaintiff's use of [sic] registration of its INSTAPRINTS mark because Instagram has misused its trademark rights by attempting to enforce its rights beyond their lawful scope with the intent to stifle competition". FAC, ¶ 83. Plaintiff's sixth claim for relief based on trademark misuse must be dismissed for multiple reasons.

First, there is no such thing as an affirmative claim for trademark misuse. *Loblaw Companies, Ltd. v. Azimi*, 2001 WL 31028016, at *16 (N.D. Cal., October 17, 2001); *Juno Online Services, L.P. v. Juno Lighting, Inc.*, 979 F.Supp. 684, 690 (N.D. Ill. 1997). Because a declaratory judgment is merely a remedy and requires a viable underlying cause of action, where, as is the case here, there is no cognizable cause of action that would support the declaratory judgment requested, such a claim should not be allowed. See *DTND Sierra Investments LLC v. Bank of New York Mellon Trust Co., N.A.*, 958 F.Supp.2d 738 (W.D. Tex. 2013)(dismissing declaratory

1 judgment claim in absence of viable cause of action).

2 Second, Count VI of the FAC merely repeats the allegations made in Plaintiff's prior
3 counts. Specifically, the allegation that forms the basis of Count VI, that Defendant should be
4 barred from instituting an action or proceeding with respect to Plaintiff's use or registration of its
5 INSTAPRINTS mark because Defendant has misused its trademark rights, is also found verbatim
6 in Counts I through V at paragraphs 52, 59, 64, 71 and 80. Count VI is, thus, redundant and
7 should be stricken. Fed.R.Civ.Proc. 12(f) ("The court may strike from a pleading . . . any
8 redundant, immaterial, impertinent, or scandalous matter.")

9 Finally, granting the relief sought in Count VI of barring Defendant from instituting any
10 action or proceeding to challenge the use or registration of the INSTAPRINTS mark conflicts with
11 the *Noerr-Pennington* doctrine, which evolved from First Amendment principles safeguarding the
12 right to petition the government for redress. *Empress LLC v. City & County of S.F.*, 419 F.3d
13 1052, 1056 (9th Cir. 2005). Such relief also transcends the limits on injunctive relief in general.
14 See *Smith v. Silvey*, 149 Cal.App.3d 400, 406-407, 197 Cal.Rptr. 15, 19 (1983) (holding injunction
15 may not be used to prohibit constitutionally protected activity including the right to petition for a
16 redress of grievances). For these reasons, Count VI should be dismissed.

17 **D. Plaintiff's Seventh Claim For Relief Based On Equitable Ground-Acquiescence,**
18 **Laches, Estoppel- Should Be Dismissed.**

19 Plaintiff's seventh claim for relief seeks a declaratory judgment that "Defendant is
20 estopped from enforcing any rights it has in the component parts of its INSTAGRAM mark
21 (which it denies) or its INSTAGRAM mark as a whole based on the doctrine of acquiescence,
22 estoppel and laches." FAC, ¶ 93. The specific relief Plaintiff is seeking is, once again, to prevent
23 "any further attempt by Defendant to institute any additional action or proceeding with respect to
24 Plaintiff's use or registration of its INSTAPRINTS mark...". *Id.*

25 This claim for relief should be dismissed as well. The equitable grounds alluded to by
26 Plaintiff, *i.e.*, laches, acquiescence and estoppel, are indisputably affirmative defenses, and not
27 causes of action. As noted above, declaratory relief should not be allowed where it is not based on
28 a cognizable cause of action. See *DTND Sierra Investments LLC*, 958 F.Supp.2d at 753.

1 Moreover, once again, the claim made in Count VII is duplicative of the allegations made in each
2 of the prior counts of the FAC at paragraphs 51, 58, 66, 73 and 79, and, therefore, is redundant.

3 More importantly, even accepting Plaintiff's allegations as true, the equitable doctrines of
4 acquiescence, laches, or estoppel do not bar Defendant's challenge to Plaintiff's application to
5 register the mark INSTAPRINTS. Many cases have held that acquiescence in the use of a mark
6 does not preclude a party from objecting to its registration. For instance, in *Coach House*
7 *Restaurant, Inc. v. Coach & Six Restaurants, Inc.*, 934 F.2d 1551 (11th Cir. 1991), the petitioner
8 owner of a New York restaurant affirmatively acquiesced in the registrant's use of the "coach and
9 six horses" logo in connection with its Atlanta restaurant for almost 20 years. However, the
10 Eleventh Circuit overturned the TTAB and the district court's findings of acquiescence as an
11 abuse of discretion, holding:

12 We conclude that the TTAB abused its discretion by failing to
13 observe the distinction in this case between acquiescence as to use
14 and acquiescence as to registration. Although petitioner actively
15 represented that the registrant could use its logo, petitioner did not
16 represent or imply that it would allow registrant to register the
17 petitioner's service mark on the federal Principal Register. Therefore,
no period of delay could have begun running as to registration, until
petitioner had notice that registrant was doing something that would
generate a claim or right of petitioner....

18 The registration was awarded to registrant on December 29, 1981, and
19 petitioner discovered the registration and objected to it by February
20 23, 1983. Thus, the period of delay as to registration was, at most,
21 just over a year. Despite their surprise in seeing its logo on the
Principal Register, petitioner was able to object in a short period of
time. According to these facts, the period of delay is not
unreasonable and certainly not inexcusable under the circumstances.

22 The absence of one element of the acquiescence case is sufficient to
23 deny the equitable relief requested.

24 *Id.* at 1558-59.

25 Similarly, delay-based defenses are consistently rejected where a rights owner timely
26 opposes a trademark application, even where that rights owner had substantial prior opportunity to
27 object to use of a mark. *See, e.g., Salem Commodities, Inc. v. Miami Margarine Co.*, 244 F.2d
28 729, 732 (C.C.P.A. 1957) (rejecting claim of laches grounded in opposer's knowledge of use of

1 applied-for mark “for a substantial period of time” on ground that opposer “could not take action
 2 until after [applicant] applied for registration and the application was published for the purpose of
 3 opposition”); *Callaway Vineyard & Winery v. Endsley Cap. Grp.*, 63 U.S.P.Q.2d 1919, 1923
 4 (TTAB 2002) (“Furthermore, inasmuch as opposer promptly opposed registration of applicant’s
 5 mark, applicant has no basis for the defense of laches, estoppel or acquiescence.”).

6 Plaintiff has not alleged that Defendant’s opposition to that application was untimely filed.
 7 See FAC, ¶¶ 2, 35, 38 (acknowledging that on February 5, 2014, Defendant filed a Notice of
 8 Opposition against Plaintiff’s October 1, 2012 application for registration of Plaintiff’s
 9 “INSTAPRINTS” mark before the United States Patent and Trademark Office’s TTAB.) As the
 10 TTAB has already ruled in that proceeding, because the opposition was timely, these defenses fail
 11 as a matter of law. This Court is requested to take judicial notice that Plaintiff’s affirmative
 12 defenses of equitable estoppel, laches and acquiescence to Defendant’s opposition were ordered
 13 stricken by the TTAB. See Defendant’s Request for Judicial Notice; Exhibit “B” at pp. 5-7. This
 14 Court should lend its voice to that ruling.

15 **IV. CONCLUSION**

16 For the foregoing reasons, Defendant’s motion to dismiss should be granted.

17
 18 DATED: November 9, 2015

Respectfully submitted,

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